

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA**

IN RE ST. JUDE MEDICAL, INC., SILZONE HEART VALVES PRODUCTS LIABILITY LITIGATION	: : :	MDL DOCKET NO. 1396
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JOINT STATUS CONFERENCE REPORT

(Status Conference— February 13, 2003, 12:30 p.m.)

The parties have met and conferred and submit this status report to the Court.

1. MOTION TO COMPEL LADNER DEPOSITION RESPONSES

The motion to compel James Ladner to answer questions at his resumed deposition, and for appointment of a referee, has been briefed and is scheduled to be argued at this status conference.

2. ST. JUDE MEDICAL'S PRIVILEGE LOG

Although the entirety of St. Jude Medical's privilege log has not yet been produced, (despite many months of assurances of its completion) counsel for the class dispute the protections claimed for a large number of documents in several categories, based on the descriptions provided in St. Jude Medical's log to date. Mr. Angstreich tried to establish the basis for some of St. Jude Medical's privilege log claims during the deposition of Mr. Ladner, but Mr. Ladner was instructed not to answer any questions related to the privilege log. As indicated in its opposition to plaintiffs' motion to compel the further deposition of Mr. Ladner, St. Jude Medical asserts that Mr. Ladner's thoughts and impressions concerning the privilege log are protected work product and that the

instruction was appropriate. Counsel for the MDL asserts that he was not seeking Mr. Ladner's thoughts or impressions, but rather, the anticipated litigation that was the "but for" predicate to the privilege asserted. Mr. Ladner was instructed not to answer any such questions, thereby preventing counsel from further challenging the work product privilege designations.

Counsel have met and conferred since the last status conference, and have discussed a process by which the parties will meet and confer in an attempt to narrow the issues in dispute. Plaintiffs' counsel has supplied St. Jude Medical's counsel with a list of documents believed to be representative of the documents they deem should be produced as not being attorney client privileged and/or work product. St. Jude Medical's counsel intends to respond by Wednesday February 12 with additional information justifying their privilege designations for the documents identified by plaintiffs. Plaintiffs' counsel contends that the agreement reached with St. Jude Medical's counsel was that they would either challenge or adopt the documents identified by Plaintiffs' counsel as being representative of the documents on the privilege log and never agreed that Defendants' counsel could augment the basis upon which the privilege log entries were predicated. Plaintiffs' position is that the determination of the designation must rise or fall based upon the content of the privilege log as it was produced with no further opportunity to justify the designations. St. Jude Medical disagrees and is prepared to brief these issues to the Court. The parties seek the Court's guidance on how to finally resolve these issues if they are unable to resolve their differences through the meet and confer process.

2. ST. JUDE MEDICAL'S "INADVERTENTLY PRODUCED" DOCUMENTS

On January 21 and 30, St. Jude Medical identified a cumulative total of 47 discovery documents (not counting duplicates produced under different Bates numbers) as having been "inadvertently produced" during the course of the MDL and state Silzone cases. St. Jude Medical claims these produced documents are subject to the attorney-client privilege and/or work-product protection, and has requested MDL class counsel (and by extension, Canadian class counsel) to recover all copies and erase all related electronic records and references.

Class counsel contends in their February 5, 2003 correspondence that although not all of the identified documents were entered on St. Jude's privilege log by the end of January 2003, based on the privilege log entries for the balance of the documents identified, most of the documents St. Jude Medical seeks to retrieve are demonstrably not privileged. Class counsel further believe that in light of the lateness of the date and the extent of the often multiple productions of these documents, both within and across cases, St. Jude Medical has waived any privilege claims for these documents, and that the costs to the Class of expunging the documents and all references thereto from all electronic media would be significant.

Class counsel has responded to the list of the documents St. Jude Medical identified, for which class counsel challenges St. Jude Medical's recent privilege and inadvertent production claims, and awaits St. Jude Medical's response.

St. Jude Medical contends that Eighth Circuit law related to inadvertent production of privileged documents does not turn on whether the documents are indeed privileged or when they were produced. Rather, waiver of the asserted privileges is a

separate issue that turns on a five-part test, including: the reasonableness of precautions in place to prevent the inadvertent disclosure, the number of disclosures, the extent of the disclosures, the promptness of measures taken to rectify the disclosure (once discovered) and the interests of justice. Gray v. Bicknell, 86 F.3d 1472, 1484 (8th Cir. 1996). St.

Jude Medical believes that the foregoing test relieves it of its counsel's inadvertent disclosure of the documents and that they should be destroyed/deleted by plaintiffs consistent with their ethical obligations as set forth by the American Bar Association. Plaintiffs' position is that Defendants' contention is without merit and ignores the following significant facts: (1) the production of these documents in numerous state court cases (not addressed or even mentioned by opposing counsel), (2) the absence of any disclosure by Defendants of the precautions taken by St. Jude Medical to protect disclosure, (3) the number of alleged inadvertently produced documents, and (4) the delay in advising of the inadvertence. All of the foregoing requires that St. Jude Medical's request be rejected and denied.

St. Jude Medical continues to meet and confer with Class Counsel and have responded to their February 5, 2003 letter. However, the response did not address the above issues raised by Plaintiffs' counsel.

4. ST. JUDE MEDICAL PERSONNEL FILES

As reported previously to the Court, due in part to deposition testimony about a St. Jude Medical "management by objectives" program, counsel for the Class has given counsel for St. Jude Medical a list of 36 current and former employees who, the Class contends, are key St. Jude Medical personnel for whom company personnel files (with

any personal medical information or other personal privileged materials removed) are sought.

St. Jude Medical first points out that the requested personnel files are not the subject of any formal document requests. Notwithstanding, St. Jude Medical contends that a request to compel the production of personnel files requires plaintiffs to establish by affidavit that the information in those files is relevant and cannot be obtained by resort to less intrusive means of discovery. The Court must also balance the plaintiffs' need for the information against the individual employees' right to privacy. In those instances where information in personnel files is relevant, the requests must be narrowly drawn. See generally, Raddatz v. The Standard Register Company, 177 F.R.D. 446 (D. Minn. 1997); Onwuka v. Federal Express Corporation 178 F.R.D. 508 (D. Minn. 1997); Cardenas v. The Prudential Insurance Co. Of America, 2003 WL 244640 (D. Minn. 2003).

St. Jude Medical submits that plaintiffs have not met their burden as set forth in the above-cited cases. The parties have conferred as to whether documents from a limited number of personnel files should be produced to the court for *in camera* review to determine whether these documents may contain information relevant to the litigation but have been unable to reach an agreement. Plaintiffs' counsel submits that by redacting and/or removing any medical or potentially privileged documents, there is no basis for opposing the document request. Plaintiffs contend that the test is whether the files may lead to the discovery of admissible evidence and requiring Plaintiffs to demonstrate relevancy without the files means that a party can refuse to produce documents based upon their own assertion that there is nothing relevant within the file. Further, based

upon the testimony of Donald Guzik there is a substantial basis to believe that the files contain discoverable documents concerning the employee's performance related to established corporate goals. Finally, Plaintiffs contend that based upon St. Jude Medical's track record to date, they cannot ascribe to the approach proposed by St. Jude Medical

5. DECLASSIFICATION OF "TOP ACCOUNTS" AND AVERT DOCUMENTS.

The parties have agreed that St. Jude Medical's "Top Accounts" survey of Silzone valve implant centers should be declassified, with codes substituted for the names of the implanting centers at St. Jude Medical's request; counsel for St. Jude Medical is working on electronic redaction of that information. St. Jude Medical opposes the declassification of the AVERT data and data analysis. St. Jude Medical maintains that the data and data analysis from the AVERT study should remain Confidential because (1) the materials constitute "confidential research" and "information involving privacy interests" within the meaning of the Court's Protective Order and (2) the AVERT study is on-going and any benefit realized from the disclosure of the data and data analysis at this time (with potential negative impact on the generation of data) is more than outweighed by the benefit to public safety of continuing the study with periodic reporting of the results.

Plaintiffs contend that there is a public health issue at large and to the extent that St. Jude Medical is engaged in on going studies, it cannot insulate the study from full scrutiny. Plaintiffs further submit that because St. Jude Medical gave the underlying documents to their forensic consultant Judith Jones, who plaintiffs contend have no greater right to the information than the medical and scientific community, St. Jude Medical can no longer assert confidentiality over these documents. St. Jude Medical

responds that this argument is nonsensical because under that analysis, any confidential document given to an expert in litigation would automatically lose its confidentiality designation.

ZIMMERMAN REED, P.L.L.P.

Dated: February 11, 2003

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